KOK EK CHOOI

v.

CHEAH SOON NEOH & ANOR.

HIGH COURT MALAYA, PENANG
ARULANANDOM J
[CIVIL SUIT NO. 787 OF 1976]
13 MARCH 1978; 3 MAY & 8 NOVEMBER 1979;
7 JANUARY & 10 APRIL 1980; 2 JUNE & 24 AUGUST 1981

LAND LAW: *Sub-division of land on agreement of both parties - Whether transfer for cultivation or to give distinct and sole ownership - Portion acquired by Government - Effect of original agreement.*

CIVIL PROCEDURE: *Specific performance - Whether specific performance can be enforced - Whether cross transfers and counter-claim for accounts, profits and other relief applicable.*

This was a claim by the plaintiff for specific performance of an agreement entered into between the plaintiff and the defendants on 11 June 1956 for the transfer of the defendants' two-eights undivided shares in Lots 1285, 1286, 1288 and 1290, Mukim 14, Province Wellesley Central, to the plaintiff in consideration of the plaintiff's undertaking to surrender his six eights undivided shares in Lots 1287 and 1289 to the defendants absolutely.

In December 1955, plaintiff and defendants purchased a piece of land known as Lot 616(3) in Province Wellesly at RM530 an acre. The plaintiff paid for and owned three fourths of the land and the defendants one-fourth.

At first land was jointly developed but as it proved unsatisfactory it was decided to subdivide the land. A survey was done dividing the land into four equal portions for distribution by drawing lots. As the portions were not of equal value it was agreed that the party who drew a more valuable lot to compensate the other by amounts agreed and specified in the sub-division plan. The lots were drawn and the plan was signed by the parties. The parties went into possession of their respective lands. Subsequently a portion of the defendants as well as the plaintiff's land was acquired by the Government as a canal reserve. Sub-division had been completed into six lots with separate titles. The plaintiff claims for specific performance of the said agreement for each party to become the sole proprietor of his portion of the land and seeks an order for the transfer to him of the defendants' two-eights undivided shares in four lots forming his portion of the land in consideration of his undertaking to surrender his six-eights undivided shares in the two lots forming the defendants' portion. The defendants claim that the sub-division was for the purpose of cultivation only and each party was to retain their individual interest in the different portions even after sub-division and issue of new titles. Further they did not receive the portion of the land they expected because of the acquisition by the Government of part of the land. The defendants also rely on s. 4 of the Statute of Frauds.

Held:

[1] The acquisition by the Government of the portion of land was not in contemplation of either party and has no bearing on the rights and obligations agreed between them.

[2] The opposition by the defendants to the consideration of oral evidence as to the terms of the agreement on the grounds that the plaintiff was relying on the plan as a note or memorandum and no separate oral agreement had been pleaded, has no merits. The oral agreement is a collateral agreement and necessary to construe and explain the meaning of the plan submitted in evidence.

[3] The signing of the plan for sub-division, being taken to the land and shown their respective portions, entering into possession of their portions and cultivating the same individually without recourse to each other and without sharing expenses or profits clearly shows that the parties sub-divided the land to get sole ownership of their portions.

[4] As to the plea under s. 4 of the Statute of Frauds the law does not specify the matters which the note or memorandum must contain. This has been left to judicial interpretation. Collateral oral agreements have been admitted to explain or construe the note or memorandum. The plan signed by the parties and submitted for sub-division is sufficient to bind parties. Further even if it is insufficient to meet the requirement that such agreement must be in writing, the fact that the defendants would perform the rest of the contract provide an equitable remedy for the plaintiff. The Court will not allow the Statute of Frauds to be used as an instrument of fraud.

[Claim allowed.]

(1) Defendants to execute valid and registrable transfers of their two-eights undivided shares to the plaintiff.

(2) Plaintiff to execute valid and registrable transfer of his six-eights undivided shares to the defendants.

(3) Failure of both parties to perform their obligations, the Senior Assistant Registrar to execute the necessary transfers accordingly.

(4) Defendants to pay costs to plaintiff.

Cases referred to:
Jacobs v. Revell [1900] 2 Ch 858
In re Puckett & Smith's Contract [1902] 2 Ch 258

Legislation referred to:
Law of Property Act 1925 [UK], s. 40(1)
Statute of Frauds 1677 [UK], s. 4

For the plaintiff - Lim Kim Chuan; M/s. Allen Gledhill
For the defendants - S. Thillaimuthu (Lim Teong Chuan with him); M/s. Lim Teong Chuan

JUDGMENT

Arulanandom J:

This was a claim by the plaintiff for specific performance of an agreement made between the plaintiff and the defendants on or about 11 June 1956, for the transfer of the defendants' two-eighths undivided shares in Lots 1285, 1286, 1288 and 1290, Mukim 14, Province Wellesley Central, to the plaintiff in consideration of the plaintiff's undertaking to surrender his six-eighths undivided shares in Lots No. 1287 and 1289 to the defendants absolutely.

The defendants denied that there was any such agreement and although the counterclaim was withdrawn at the trial, the defendants in their pleading by way of counterclaim alleged that the plaintiff had since the year 1973 unjustly kept the income and profits from the portions of the said land cultivated by him and had failed to distribute to the defendant their fair share of the same. Wherefore they counterclaimed for:

(i) an order that the plaintiff do render true and proper accounts of all the incomes and profits from the land bearing Lots Nos. 1285, 1286, 1288 and 1289, Mukim 14 Province Wellesley Centre since the year 1973, and

(ii) an order that the plaintiff pay to the defendant two-eighths share of the total income and profit so found to be due from the said lots.

At the commencement of the hearing on 8 November 1979, the defendant applied to amend the defence by the addition of para. 2A:

> There is no or sufficient memorandum in writing of the alleged agreement and the defendant will rely on section of the Statute of Frauds.

As plaintiff's Counsel had no objections the amendment was allowed.

The brief history of the matter is as follows. Some time in December 1955 the plaintiff and the defendants (who were husband and wife) who knew each other well together purchased Lot No. 616 (3) Mukim 14 Province Wellesley Central at RM530 per acre. The agreement was that plaintiff was to pay for and own three-fourths of the land and defendant were to jointly own one-fourth of the land. This is admitted.

At first the land was worked jointly but as according to the defendant's son, the arrangement was not satisfactory it was decided to sub-divide the land. To this end a survey was done and a plan drawn up subdividing the land into four portions marked A, B, C, and D, each being one quarter of the whole land. Parties were to draw lots of their portions. But as the value of the four portions were not equal because of the nature of cultivation, it was decided that the one who drew the more valuable lot had to compensate the other with cash. The amount of compensation was fixed and marked on the plan. The person who drew Lot D had to pay RM250 as compensation to the other, the person who drew Lot A had to pay RM450, and the person who drew Lot B had to pay RM600. These sums were to be paid to the person who had Lot C. All this was done in the office of a lawyer Ong Huck Lim (now deceased) who wrote the amounts of compensation on the respective portions in the plan. In the event the defendants drew portion D and in accordance with the agreement paid RM250 to the plaintiff. The object and purpose of this subdivision was in order that each party could become sole proprietor of his share of the land originally purchased, go into possession immediately and plant and develop his land and reap the harvest. After the lots were drawn each party signed his name on the lot which was to belong to the plaintiff or defendants respectively. The defendants signed on Lot D and the plaintiff on the others (the plan was tendered and marked P2 at the trial).

In accordance with the agreement the parties went into possession of their respective portions and each one surrendered all claim on the portion or portions allotted to the other.

The plaintiff for his part felled all the trees on his land which was part rubber and part jungle and planted it with oil palm which he is still doing. There was no question of rendering accounts or sharing expenses or profits with the defendants. The defendants on

their part planted their portion with rubber. It was agreed between the parties that once subdivision was completed and new titles were issued the parties would sign the necessary cross transfers of their respective undivided portions to regularize their sole proprietorship.

The defendants now contend that the plaintiff's version of the purpose of subdivision is not correct. They aver that the sole purpose of subdivision was for the purpose of cultivation and that each party was to retain his undivided interest in the different portions of the land even after subdivision and the issue of new titles.

The vital question to be answered before one can adjudicate is whether the purpose of subdivision of the land into the respective shares of the parties was for the purpose only of cultivation as the defendants allege or for the purpose of giving distinct and sole ownerships to the parties of their respective portions of the land. From the point of view of the defendants the other issue to be considered before specific performance could be ordered was the fact that the defendants, even if they agreed to subdivide the land for the purpose of having separate ownership, did not receive the portion of land they expected to receive because of Government acquisition of part of the land as a canal reserve. To my mind the acquisition of part of the land by Government does not affect the original agreement. The acquisition by Government of the portion of land was not in the contemplation of either party, nor was the plaintiff in any way responsible for diminution of the defendant's portion. By the acquisition the plaintiff himself lost a portion of his land, and therefore a compulsory acquisition by Government which no party could prevent or interfere with could have no bearing on the rights and obligations between two parties to an agreement between them. The cases of *Jacobs v. Revell* [1900] 2 Ch 858 and In *re Puckett & Smith's Contract* [1902] 2 Ch 258 which were cited to me in support of the proposition that a purchaser had a right to rescind a contract when what he agreed to purchase was not the same as what he received had no relevance to this case as these were cases where it was the vendor who was guilty of misdescription of the title as a result of which the purchaser was misled and did not get what he expected to get.

Counsel for defendants also vehemently opposed the consideration of oral evidence regarding the terms of the agreement to subdivide as the plaintiff was relying on the plan as a note or memorandum in writing as evidence of the contract and no separate oral agreement had been pleaded. I see no merit in this argument. The oral agreement is a collateral agreement and necessary to construe and explain the meaning of P2, the plan submitted in evidence. The markings on the plan evidently have significance when considered in the background of the plaintiff and defendants having unequal undivided shares in the said land.

Furthermore the plaintiff's only witness Abdul Rahim Darus who was working for Haji Ismail bin Hassan the person who prepared the plan P2 stated that he was the one who accompanied Haji Ismail to the land and measured it. He stated on oath:

> It (the plan) shows land being divided into four portions A, B, C & D. I measured the land and showed the parties their four portions ... The portions were marked by posts ... The plan was drawn because they wanted to ascertain in their own portions.

And on cross-examination he said:

> The defendants speak a little bit of Malay. I did see them on the land. They spoke to me. The land is large. I only showed them the boundaries. The second defendant told me he has bought portion D.

Again, defendants' son DW1 stated in evidence that they decided to subdivide because there would be less trouble and that plaintiff and the defendants did not share the costs or produce of each other's portions of the land. And further the first defendant herself says that she collected the produce on her own portion and they were not entitled to the profits from the plaintiff's land.

Again in the statement of defence in paras. 3 and 4 the defendants state that they signed the plan marked K1 annexed to the statement of claim purely for the purpose of replanting crops and to facilitate the obtaining of replanting grant but in the letter of 30 June 1976, written by their solicitor (p. 20 of Agreed Bundle) it is admitted that it was for subdivision, which is what the plaintiff alleges.

Considering all the evidence the only conclusion and the only logical one, that the Court can come to is that the parties decided to subdivide the land to get sole ownerships of their portions according to their undivided shares. Subdivision was not solely for the purpose of cultivation for if it were so they would have to share costs and expenses of developing the separate portions and shared the profits in the proportions of their undivided shares. To put any other construction on the signing on the plans and all the circumstances would be to indulge in ostrichism. That the parties understood the full import of signing the Plan K1 in the portions allotted to them, where the compensation to be paid by the allottees of the several portions is marked, the significance of signing the Plan P2 for subdivision, and then being taken to the land and shown where their respective portions were by PW2, then entering into possession of their portions and cultivating their respective portions individually without recourse to each other and without sharing the expenses incurred, and then not expecting or making demands for share of profits from each other, all indicate very clearly that all the ingredients of a binding contract were contained in the plan signed by the parties.

The defendant, at the trial amended his defence to include a plea under s. 4 of the Statute of Frauds which has been re-enacted by s. 40(1) of the Law of Property Act 1925. The section reads:

> No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof is in writing, and signed by the party to be charged, or by some other person thereunto by him lawfully authorised.

The law does not specify the matters which the note or memorandum must contain. This has been left to judicial interpretation. The Courts have held that the note or memorandum need not be prepared as such. Collateral oral agreements have been admitted to explain and construe the note or memorandum. The Plan K1 signed by the parties which was later sent for subdivision is sufficient to bind the parties. Furthermore even if it is not sufficient to meet the requirement by statute that the agreement must be evidenced in writing, the fact that the plaintiff has partly performed the contract in the expectation that the defendant would perform the rest of the contract provides an equitable remedy for the plaintiff and would not enable the defendant to escape from the obligations of his contract upon the strength of the statute but the Court will order specific performance of the contract. It has long been established that no Court will allow the Statute of Frauds to be used as an instrument of fraud. Hence the defence of non-compliance with the Statute of Frauds will be of no avail to the defence.

The only thing remaining to be done in the transaction between the plaintiff and the defendants is for them to sign cross transfers of their undivided shares in the respective new titles to land.

The Order of the Court will therefore be:

(1) The defendants execute valid and registrable transfers of their two-eights undivided shares in Lots No. 1285, 1286, 1288 and 1290 Mukim 14 Prince Wellesley Central to the plaintiff. In the event of their failing to do so within one month of this day, the Senior Assistant Registrar do execute the said necessary transfer.

(2) That the plaintiff execute valid and registrable transfer of his six-eights undivided shares in Lot No. 1287 and 1289 Mukim 14, Province Welleslely Central to the defendants. In the event of his failing to do so within one month of this date the Senior Assistant Registrar do execute the said necessary transfer.

(3) Costs to be paid by the defendants to the plaintiff.

Also found at [1981] CLJ 179